IN THE MATTER OF
THE WESTGATE TUNNEL PROJECT

SUBMISSIONS MADE BY THE CITY OF MELBOURNE ON THE PRODUCTION OF DOCUMENTS

## 1. Introduction

1.1 The Inquiry and Advisory Committee (**IAC**) has requested the City of Melbourne (the **COM**) provide it with written submissions in response to the WDA's submissions opposing a direction that it produce documents being the Allard reviews and allied documents (together the **Allard documents**).

1.2 The WDA has provided one affidavit in support of its submission being the affidavit of Paul Malcolm Smith (the **Smith Affidavit**).

1.3 The COM rejects the objections to the production of the documents on the basis that:

1.3.1 the Allard documents do not qualify for protection as Cabinet documents; and/or

1.3.2 there is a strong competing public interest in disclosure.

1.4 Further, the Allard Documents are highly relevant to the matters in issue in this proceeding. In particular, they are relevant, if not essential, to the IAC being able to make an informed and fair assessment of:

1.4.1 the reliability of the VLC model outputs that are a fundamental component of the EES; and

1.4.2 the weight that can be attached to the evidence of Mr Veitch, and an assessment of his reliability and credibility.

1.5 Further, the production of the Allard documents is necessary to ensure that the COM is afforded procedural fairness in this hearing.

## 2 The Powers of the IAC

2.1 There appears to be no dispute that the IAC has, by reason of s.152(2)(c) of the *Planning and Environment Act 1987 (Vic)*, the power to require the production of the Allard Documents, provided:

2.1.1 The documents relate to matters being considered by the IAC; and

2.1.2 The IAC reasonably requires the documents.

2.2 However, the power of the IAC to order the production of relevant material must be understood, and applied, in the context of the following:

2.2.1 the IAC has been commissioned to carry out a public inquiry into an infrastructure project of State significance.

2.2.2 the inquiry is required because the Project has the potential to have significant impacts on the environment, and on the well-being of the community;

2.2.3 the purpose of the inquiry is, in part, to identify whether the Project would result in a net community benefit;

2.2.4 the inquiry is required to be a transparent process in which the participation of the public is to be facilitated;

2.2.5 the nature of the hearing is an investigative process designed to achieve good outcome for the community in terms of environmental impacts. It is not an adversarial process or private litigation; and

2.2.6 the IAC is required to conduct the hearing in a way that is procedurally fair.

**The Documents are Reasonably Required by the IAC to perform its Task**

2.3 The proposition that the Allard Documents are not reasonably required by the IAC to perform its task cannot be accepted.

2.4 The reliability of the VLC Zenith model, and its outputs is a central issue in this Inquiry. The outputs are the foundation for the assessment in the EES of most of the environmental impacts of this project, including (but not limited to) its traffic impacts,

noise impacts, greenhouse gas emissions, air quality impacts, public health impacts, and social impacts. They have also informed the design of the Project itself, in the sense that it has been designed to accommodate the predicted levels of traffic.

2.5 The need to demonstrate the reliability of the VLC Zenith model and its outputs is recognised by the WDA. It was for that purpose that Mr Veitch was called to give evidence. His evidence was presented to the IAC for the predominant, if not sole, purpose of establishing the reliability of the model. His evidence included positive assertions that the model was credible and reliable.

2.6 Other witnesses, including Mr Kiriakidis, Mr Hunt and Mr Keys have also been asked questions by the WDA as to their opinions as to the reliability of the VLC Zenith model and its outputs.

2.7 It follows that it is necessary for the IAC needs to make findings as to the reliability of the VLC Zenith model and its outputs before it can make any meaningful assessment regarding environmental impacts of the Project.

2.8 The relevance of the Allard Documents is also demonstrated by the fact that Mr Veitch addressed the documents, and their contents in his evidence in chief (as well as in cross-examination). The COM has prepared a written transcript of the relevant parts of his evidence which record what he said about the Allard Documents.

2.9 In cross-examination, was asked questions about the contents of the Allard documents, without objection. Again, the COM has prepared a written transcript of the relevant parts of his cross-examination.

2.10 Significantly, the WDA did not object to any question put to Mr Veitch, either on the basis that it was not relevant, or on the basis that it concerned information that was subject to any form of public interest immunity or privilege.

2.11 In response to questions, Mr Veitch said, inter alia, that:

2.11.1 Mr Allard has been critical about some fundamental aspects of the modelling;

2.11.2 Mr Allard was a very experienced and well regarded independent traffic engineer

2.11.3 that the material within the documents provided by the independent peer reviewer were relevant matters, and that is why he has given evidence about them;

2.11.4 that he had been clearly and unambiguously told by Mr Allard that the "single distribution" approach was the wrong approach to adopt, and was not supported by him;

2.11.5 that the outputs produced using the "single distribution" methodology were materially different to the outputs produced using the "loop through distribution approach"

2.12 Significantly, Mr Veitch's cross examination also included the following exchanges:

**TWEEDIE** Well, let me tell you this … let me ask you this: Let's leave aside the issue of confidentiality, do you agree that the material within the documents provided by the independent peer reviewer are relevant?

**VEITCH** They are relevant, I agree. And that's why I've presented them in this presentation.

**TWEEDIE** And they would also assist this Committee to understand better what an independent person says about the suitability of your modelling for the task that's been undertaken.

**VEITCH** Sure.

**TWEEDIE** In fact, you think it would be a good thing, wouldn't it, for the committee to have access to what the only independent peer reviewing voice has said about your modelling. You'd welcome that, wouldn't you?

**VEITCH** Well, I think peer review … the views of a peer reviewer are relevant in that sense, yes.

2.13 It can also be noted that Mr Vietch gave evidence that he had been "*released to talk about all of the issues that were raised with the modelling during the business case*". The giving of that release is no consistent with the WDA's subsequent claims that the issues are not relevant, that the Allard Documents are not relevant, or with the WDA subsequent claim that the Allard Documents are privileged.

2.14 The assertion of the WDA in its submissions that the peer review is only relevant to the 2011 version of the Zenith Model ought be rejected. Mr Vietch's evidence was that the "single distribution" methodology was used both in the 2011 Zenith model **and** the 2014 Zenith model. It follows that any criticisms contained in the Allard Documents regarding the use of that methodology are equally relevant to the 2014 Zenith model. Mr Veitch did not suggest otherwise.

2.15 The submission made by the WDA at [31] of its submissions are without merit. It is an absurd proposition that a witness can be permitted to give evidence about the contents of certain documents, be cross-examined without objection about the contest of those documents, agree that the contest of the documents are relevant to his evidence and the EES and yet somehow the documents themselves can be regarded are neither relevant, nor necessary to afford procedural fairness. Not surprisingly, the WDA has referred to no authority that would support this argument.

## 3 The claim of Privilege - Relevant legal principles

3.1 Public interest immunity and its statutory analogue under s 130 ("matters of state") of the Evidence Act 2008 (Vic) (the **Evidence Act**) were recently considered by the Victorian Court of Appeal in *Ryan v State of Victoria*[1] ***(Ryan).***

3.2 In the leading judgment in *Ryan*, Tate JA (with whom Santamaria and Ferguson JJA agreed) considered the interaction between the common law PII and s 130 of the Act, concluding that "... *the statutory immunity [in s 130] is intended substantially to*

[1] [2015] VSCA 353.

*reflect common law principles and its content and operation is informed by the common law*".[2]

3.3 While the Evidence Act is not strictly applicable to the IAC powers in this hearing, its terms are instructive insofar as they essentially reflect the relevant common law principles.

3.4 Section 130 provides:

> **130 Exclusion of evidence of matters of state**
>
> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
>
> (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
>
> (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—
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> (a) prejudice the security, defence or international relations of Australia; or
>
> (b) damage relations between the Commonwealth and a State or between 2 or more States; or
>
> (c) prejudice the prevention, investigation or prosecution of an offence; or

[2] At [100]. The Court of Appeal brought Victoria in line with the New South Wales and Federal jurisdictions: see analysis at [58]-[67].

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters—

(a) the importance of the information or the document in the proceeding;

(b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;

(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to a Territory.

3.5 The assessment of a PII claim essentially requires the IAC to weigh the public interest that would be harmed by the production of the evidence against the frustration or impairment of the administration of justice if the evidence was withheld.[3]

3.6 The limits of PII must be very strictly drawn.[4] The immunity should be given no greater scope than is demonstrably necessary.[5] The Victorian Court of Appeal in *State of Victoria v Brazel*[6] stated:

> It is one thing to acknowledge that the proper functioning of a government agency is in the public interest. The same might be said - uncontroversially - about any government department or agency. It is quite another thing to accept that particular information in the possession of a government agency is of such sensitivity, and its disclosure would therefore cause such injury to the public interest, that information of that type should be treated as capable of attracting PII. Unless that threshold is passed, no question of balancing arises.[7]

3.7 The party objecting to disclosure bears a heavy burden to establish *"real"* rather than merely *"some"* harm to the public interest from disclosure.[8]

3.8 The party seeking access to the documents must demonstrate a legitimate forensic purpose in disclosure.[9] For the reasons set out earlier in these submissions, it is submitted that this legitimate forensic purposes has been amply demonstrated.

3.9 The common law recognises the *"rough, but acceptable"* division of public interest immunity claims into class and contents claims.[10] Documents can be immune from disclosure on the basis of their class because their disclosure would injure the public interest. Documents that do not belong to such a class may still be immune from

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[3] *Ryan* at [53] (Tate JA (Santamaria and Ferguson JJA agreeing).
[4] *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 32 [42] (Maxwell P); *State of Victoria v Brazel* (2008) 19 VR 553 at 563 [24] (Maxwell P, Buchannan and Vincent JJA).
[5] Ibid.
[6] (2008) 19 VR 553.
[7] At 563 [25] (Maxwell P, Buchanan and Vincent JJA).
[8] *Somerville v ASC* (1995) 60 FCR 319 at 354 (Lindgren J).
[9] *Ryan* at [55].
[10] *Commonwealth v Northern Land Council* (1993) 176 CLR 604 (***Northern Land Council***) at 616 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Ryan* at [56] (Tate JA (Santamaria and Ferguson JJA agreeing).

disclosure, on the basis that their contents, if disclosed, would injure the public interest.

3.10 A claim in respect of documents is, by its nature, general and that claim will normally be upheld if the class is one that is recognised as being, *prima facie,* subject to PII.[11]

3.11 A class claim is not easily established.[12] Class claims will only be upheld if it is really necessary for the proper functioning of the public service to withhold documents of that class from production.[13] Class claims based on the need to encourage candour of communication between government officials have been disparaged.[14]

3.12 'Cabinet documents' are a recognised class of documents subject to public interest immunity. 'Cabinet documents' include:[15]

3.12.1 Cabinet minutes or other records of Cabinet discussions and records of discussions between heads of departments;

3.12.2 papers prepared as submissions to Cabinet;

3.12.3 papers brought into existence for the purpose of preparing a submission to Cabinet;

3.12.4 documents and communications passing between a Minister and the head of his department relating to Cabinet proceedings and material prepared for Cabinet; and

3.12.5 any documents which relate to the framing of government policy at a high level.

3.13 There is no absolute immunity from production and inspection of Cabinet documents.[16] The Court must still weigh the public interest in the proper functioning

[11] *Spencer v Commonwealth of Australia* (2012) 206 FCR 309 ***(Spencer)*** at 323 [43] (Keane CJ, Dowsett and Jagot JJ).
[12] *Sankey v Whitlam* (1978) 142 CLR 1 ***(Sankey***) at 62 (Stephen J).
[13] *Sankey* at 39 (Gibbs ACJ).
[14] *Sankey* at 62-63 (Stephen J).
[15] *Sankey* at 39 (Gibbs ACJ); Tatts Group Limited v State of Victoria [2013] VSC 301 (Tails) at [32] (Sifris J); *Spencer* at 320.
[16] *Northern Land Council* at 616.

of government with the public interest in the proper administration of justice whereby all relevant documents are available to a party seeking to litigate a claim.[17]

3.14 Not all Cabinet documents are deserving of the same level of protection. It will only be in exceptional circumstances that disclosure will be ordered of documents revealing Cabinet deliberations.[18] Documents disclosing the deliberations of Cabinet have 'a pre-eminent claim to confidentiality'.[19] A judge should not order the disclosure of the contents of documents recording Cabinet deliberations unless the judge is satisfied that the material is crucial to the proper determination of the relevant proceeding.[20]

3.15 The Allard Documents are not claimed to fall into this category, and have no potential to reveal Cabinet deliberations.

3.16 The more closely connected documents are with actual cabinet deliberations the greater the need to disclose them in the interests of the administration of justice must be for access to be granted.[21] Of course, the converse is also true — the more tenuous the link between a document and actual Cabinet deliberations the more the balance favours disclosure.

3.17 Moreover, even where the claim is made on the basis of class, the extent of protection depends on the subject matter with which the documents are concerned as well as all of the surrounding circumstances.[22] Simply put, 'state papers' do not form a homogenous class.[23]

3.18 A relevant matter for the Court to consider is the currency of the subject matter of the document.[24] In State of *Victoria v Brazel*[25] the Court of Appeal stated:[26]

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[17] Ibid.
[18] *Northern Land Council* at 618.
[19] Ibid.
[20] *Northern Land Council* at 619.
[21] *Queanbeyan City Council v Actew Corporation Ltd* (2008) 253 ALR 121 at 127 [20] (Stone J).
[22] *Sankey* at 42 (Gibbs ACJ).
[23] Ibid.
[24] *Ryan* at [57].
[25] (2008) 19 VR 553.
[26] At 568 [49] (Maxwell P, Buchanan and Vincent JJA).

> [I]f the information is out-of-date, the risk of injury to the public interest is likely to be much reduced, if not non-existent. The need for secrecy may be short-lived or long-lasting. Everything depends on the subject-matter and content of the information in question. (Emphasis added)

3.19 Where a document has been published to the world, there is no longer any reason to deny to the Court access to the document.[27] Further, where one document forming part of a series of Cabinet papers has been published, but others have not, it may be that it would be unfair and unjust to produce one document without the rest, and that where one such document has been published it becomes necessary for the Court to consider whether that circumstance strengthens the case of the disclosure of the connected documents.[28]

3.20 Public interest immunity cannot be waived by the parties and must be taken up by the Court if not claimed by either party. Where an authority refrains from pressing the claim, the situation is characterised not as one of waiver but as one where no public interest is established.[29]

3.21 However, since the claim to immunity is based on the need to maintain the confidentiality of sensitive material, the fact that the material is already in the public domain cannot be ignored for it cannot be suggested that there is any interest in the document to protect.

3.22 It has been observed that, because a claim of public interest immunity is directed to the protection of confidentiality, 'publication' is to be considered as a loss of this confidentiality (Marsden v Amalgamated Television Services Pty Ltd [1999] NSWSC 284 at [28] per Levine J).

[27] *Sankey* at 45 (Gibbs ACJ); Tatts at [35].
[28] Ibid.
[29] *Rogers v Home Secretary* [1972] 2 All ER 1057.

3.23 In the case of *Holloway v Commonwealth of Australia* [2016] VSC 317, one reason pointing in favour of disclosure was that some of the material was already in the public domain and freely available online (at 130).

Evidence in support of PII claims

3.24 The affidavit evidence claiming PII should state precisely the grounds on which it is contended that documents or information should not be disclosed so as to enable the Court to evaluate the competing interests.[30] Amorphous statements about harm are not sufficient.[31]

3.25 In *State of Victoria v Brazel*, the Court of Appeal stated:

> *The claim for immunity must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute a compelling case for secrecy. Anything less will be unlikely to suffice.*[32]

3.26 Where statements in the affidavit evidence are presented at a high level of generality they may prevent any real assessment of their strength.[33]

3.27 In balancing the competing public interests, the Court is required to give weight to the assertion of a responsible representative of government that there is a public interest which would be jeopardised by the production of the documents.[34]

3.28 It is however the task of the Court to determine for itself the extent to which the public interest will be harmed by disclosure, and whether the balance favours disclosure. The Court is better qualified to make that assessment than a representative

[30] *Sankey* at 96 (Mason J).
[31] Ibid.
[32] At 575 [68].
[33] *Ahmet v Chief Commissioner of Police* [2014] VSCA 265 (Ahmet) at [26] (Nettle JA and Sloss AJA).
[34] *Ryan* at [57].

of the Government.[35] The evidence of a responsible representative of government is not determinative.[36] Justice Stephen in Sankey stated:

> *A claim to PII has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not PII should be accorded.*[37]

3.29 Ordinarily, the person who swears the affidavit should have seen the documents in question, whether the claim is a class claim or a contents claim.[38] The weight to be given to an affidavit asserting harm to the public interest would necessarily be reduced if the person swearing the affidavit had not seen the documents.[39]

Inspection of documents by the Court

3.30 It will only be in exceptional circumstances that disclosure will be ordered of documents revealing Cabinet deliberations.

3.31 Where such exceptional circumstances exist, the appropriate course will ordinarily be for the judge personally to inspect the documents for the purpose of deciding whether the relevance of the material to the proceedings in which disclosure is sought is sufficient, even in those exceptional circumstances, to justify disclosure.[40]

3.32 Where the documents do not themselves disclose Cabinet deliberations and if there is cogent evidence in support of harm, the Court may inspect the documents if there is a sufficient demand of justice for disclosure having regard to the importance of the

[35] *Ahmet* at [26] (Nettle JA and Sloss AJA).
[36] *Ryan* at [57].
[37] *Sankey* at 58.
[38] *Sankey* at 43-44 (Gibbs ACJ).
[39] *Sankey* at 44 (Gibbs ACJ).
[40] *Spencer v Commonwealth* (No 3) [2012] FCA 637 at [21] (Emmett J). An appeal from Emmett J's decision on public interest immunity was dismissed by the Full Court in Spencer.

documents to the proceedings.[41] Applying that reasoning, where the evidence falls short of being cogent the Court may consider it appropriate to inspect the documents in any event.

3.33 Where a contents claim is made in respect of documents, it will normally be necessary for the Court to inspect the documents.

3.34 The Court must exercise caution to ensure that documents are not shielded from public scrutiny or inspection by parties to litigation under an unduly broad claim of PII.[42]

Examples of Court ordered disclosure of Cabinet documents

3.35 While each case of course turns on its own facts, specific examples can provide useful guidance of the circumstances in which the Courts have been willing to order disclosure of Cabinet documents and ministerial briefing notes.

3.36 Examples include:

3.36.1 *Sankey* — Each of Gibbs ACJ,[43] Stephen J,[44] Mason J[45] and Aickin J[46] (agreeing with Stephen J) ordered that certain 'Cabinet papers' be produced. The documents in question included:

i. Category 1 — An explanatory memorandum and schedule relating to a meeting of the Executive Council held on 7 January 1975. The evidence about these documents was that they "*relate to advice given and recommendations made to the Federal Executive Council and the deliberations and decisions of that Council and to the inner workings of the Executive Government of the Commonwealth of Australia*."

[41] *Spencer* at 320.
[42] *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 50-51 (Lockhart J).
[43] At 46-7
[44] At 80.
[45] At 100.
[46] At 103 and 107.

ii. Category 2 — Three memoranda from a senior official of the Treasury to a senior official of the Department of Minerals and Energy. A note in the files of the Treasury recording a meeting with the Prime Minister on 13 December 1974

iii. Category 3 — A minute paper from a senior official of the Treasury to his Minister.[47]

Justice Mason described the Commonwealth's case for non-production to be "not strong".[48] His Honour was influenced in part by the fact that many of the matters to which the documents related were public knowledge by reason of publicity of the events in question.[49] Justice Stephen was particularly influenced by the nature of the proceeding.[50]

3.36.2 In *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2001] FGA 1080 (Wilcox J) — The Court ordered disclosure of internal memoranda relating to proposed statutory amendments, drafts of a Cabinet submission, the final Cabinet submission and the record of the formal Cabinet decision.[51] Justice Wilcox reasoned that it can be accepted in some circumstances that revelation of documents may discourage public officers from expressing views with candour, however, everything must depend upon the nature and subject matter of the documents.[52] A person who read a final Cabinet submission, and compared it with the Cabinet decision, would learn whether and if so to what extent Cabinet departed from the decision, however the person would have no information about the reasons for or circumstances of that departure.[53] It would provide no information about Cabinet's deliberations.[54] That point of distinction is of crucial importance.[55]

[47] See the description given by Gibbs ACJ of the categories of documents at 32-33, and similarly Stephen J at 52-54. Mason J identified the categories somewhat differently at 94-95.
[48] At 100.
[49] Ibid.
[50] At 56.
[51] At [12]-[13] and [25].
[52] At [16].
[53] At [18].
[54] Ibid.
[55] Ibid.

3.36.3 *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 (Allsop P, Hodgson JA and Sackville AJA agreeing) — the Court ordered disclosure of various documents, including the Minister's speaking notes to cabinet and draft cabinet minutes. The bases for the disclosure included that the documents did not or did not substantially relate to policy or were not current, while being important to the issues in the proceeding.[56]

3.37 *Winky Pop Pty Ltd v Mobil Refinery Australia* [2013] VSC 315 (Digby J) —The Court ordered the disclosure of a briefing note to a minister with six (6) attachments. The Court reasoned that documents relating to lower levels of government business are not comparable to documents in the nature of Cabinet papers or submissions to cabinet or reflective of cabinet deliberations.[57] The Court was not persuaded that disclosure would inhibit the government's ability to obtain full and frank advice, despite the evidence to that effect.[58]

Importantly, the Court recognised that the relevant government department had already reached the point of having prepared what appeared to be a final brief to the Minister. Further, the Court noted that ordering production of the documents was unlikely to affect the quality of advice which the Minister's advisers may provide in future matters.[59]

## 4 The Smith Affidavit

4.1 The affidavit evidence filed by the WDA in support of its claims for public interest immunity is manifestly inadequate.

4.2 The affidavit evidence is provided by Paul Malcolm Smith, the Manager of Traffic and Network Planning by the WDA.

[56] See for example at [99]-[106].
[57] At [53].
[58] At [54]-[58].
[59] Ibid.

4.3 Mr Smith does not claim to have read any, far less, all the documents. Mr Smith notes at paragraph 22 that as a member of the project team, he requested *"VLC to prepare a written response to Allard's comments"*, but nowhere in the affidavit does he state that he has read the documents. In [23] he describes the contents of the VLC Response, which suggests that he may have read that document, but nowhere does he describe the contents of any of the Allard Documents.

4.4 The highest Mr Smith's evidence goes is his assertion that "*the purpose of the independent peer review by John Allard was to enhance the robustness of the Business Case which was prepared to assist Cabinet in its deliberations on the Project*"[60].

4.5 COM readily accepts that documents recording or disclosing *actual* Cabinet deliberations ought not to be disclosed except in exceptional circumstances. However, according to Mr Smith's evidence the Allard documents do not reveal actual Cabinet deliberations.

4.6 Further, he refers to the "*purpose of the review*". He does not address the actual documents

4.7 Further, Mr Smith's evidence is at a high level of generality. He merely asserts that he is "*concerned*" that public disclosure has the "*potential"* to discourage frank and robust advice by peer reviewers, but does not assert that it actually would, or that he believes that it would.

4.8 It follows, that has not been established that production of the documents will, or are likely to, result in the WDA receiving reliable and comprehensive written advices or adversely impact the government's ability to obtain full and candid advice on such matters including because there would be no confidence that the views and opinions of the reviews would remain confidential.

[60] At [26]

4.9 Mr Smith's evidence states at paragraph 29 that the Allard documents reflect a point in time *"almost 2 years ago"* in the developing of the project modelling. Mr Smith asserts that this modelling has *"now been superseded"*. It is unclear how it could be said that information that has been superseded could warrant the same degree of protection as documents which reveal actual deliberations in Cabinet (which is not made out in Mr Smith's evidence in any event).

4.10 Further, it can be noted at [21] Smith deposes that the Final Allard Comments were "provided" on "21 December 2015". It can be noted that he does not identify to whom they were provided, and does not assert that they were provided to Cabinet.

4.11 Further, this is after the Business Case was finalised, and after the state announced its intention to proceed with the Project.

4.12 Mr Smith does not identify how, in these circumstances, the Final Allard Documents could possibly have assisted cabinet with its deliberations on the Project.

## 5 Submissions about the Allard documents

5.1 As is made clear in the WDA's submissions, the WDA provides that PII should be maintained on the basis that:

5.1.1 the Allard documents are Cabinet documents (the Class Claim) – the production of which is generally contrary to the public interest; and

5.1.2 production of the Allard documents would interfere with the State's ability to obtain frank and fearless advice regarding the merits of infrastructure projects and the documents are in nature of on-going commentary (the Contents Claim).

5.2 The COM makes the following points in response to the WDA's PII claims.

<u>The Allard documents are Cabinet documents</u>

5.3 The WDA in its submissions states that:

> At the very least, the Allard reviews are 'document[s] relating to the framing of government policy at a high level'.

5.4 This is not the evidence.

5.5 Mr Smith's evidence is that the purpose of undertaking peer reviews is to support and strengthen the robustness of the Business Case. A peer review is not comparable to documents in the nature of Cabinet papers or submissions to cabinet or reflective of cabinet deliberations.

5.6 The WDA in its submission states that, the Final Allard Comments is a Cabinet document because:

> Publication of that document may reveal information which was contained in the Allard reviews and thus reveal matters which may have been considered by Cabinet and [t]hat document is, in any event, a document relating to the framing of government policy at a high level.

5.7 This too is not in the evidence.

5.8 Mr Smith's evidence does not state that any of the Allard documents reveal matters which may have been considered by Cabinet. He does not claim that the Allard Documents were ever referred to Cabinet. He does not claim that the contents of the Allard Documents were ever actually disclosed to Cabinet in any form.

5.9 The WDA in its submissions states that:

> a document that comments on the 2011 model lacks a <u>sufficient connection</u> with the model used for the EES. (Emphasis added)

5.10 For the reason already discussed earlier in these submissions, that submission must be rejected. The 2011 model and the 2014 model both uses the same methodology (the

single distribution methodology) that was the subject of criticism by Allard. Mr Vietch admitted that these criticisms were equally relevant to the 2014 model.

No sufficient basis to require production

5.11 The WDA submits that there is no proper basis to assert that the peer review is 'crucial' to fair resolution of the matters before the IAC and in particular the unavailability of the peer review (and other Allard documents) do not raise any procedural fairness issues.

5.12 A number of observations may be made:

5.12.1 The documentation accompanying the Transport Impact Assessment provides considerable detail on the 2014 Zenith model. The 2014 model has been adapted pursuant to comments made on the 2011 model. Procedural fairness is denied if an independent peer review which raised doubts as to the reliability of the model, in any stage, is supressed.

5.12.2 Mr Tim Veitch has given evidence to the IAC as to the contents (in general terms) of the independent peer review. In order to properly assess this evidence, it is necessary to have access to the Allard documents.

The Public Interest

5.13 If the IAC is satisfied that the Allard documents are Cabinet documents, then for substantially the same reasons set out above, the public interest in production outweighs any interest in non-production.

5.14 The Business Case itself was released publically (albeit with some minor redactions). There are numerous references in that document to the 'Veitch Lister' modelling, including graphs which set out the results of that model. The public interest is not satisfied by having these results in the public domain, but suppressing the peer review which raises doubts as to their reliability.

5.15 Moreover, the tender process is apparently complete, accordingly there is no public interest in supressing the Allard documents with regard to preserving the State's interest with respect to the tender. Further, it has not been identified how the Allard Documents could possibly impact on the tender process.

5.16 There is no evidence to suggest that ordering production of the documents would be likely to affect the quality of advice which the Minister's advisers may provide in future matters. Indeed, one would have thought that a "frank and fearless" independent peer reviewer would be far more concerned with the government suppressing his advice that a particular traffic model is flawed, and at the same time promoting the flawed model as being highly reliable, than with the public being made aware of just how "frank and fearless" he was in providing that advice.

5.17 Further, and most significantly, the cat is already well and truly out of the bag with respect to these documents. The fact that Mr Allard peer reviewed the Zenith model, the fact that he criticised parts of the model and the broad substance of that criticism, are all now matters known to the public. This disclosure occurred either by the actions of the WDA, or without objection from it. How then can it be said that the actual disclosure of the Allard documents is necessary in the public interest? How can it be said that telling the IAC and the public only the part of the story that the WDA wants heard is in the public interest?

5.18 The answer is obvious. It is not. Accordingly, the IAC should direct that the Allard documents be provided to it, and the COM.

**Dated: 31 August 2017**

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